FILED December 8, 2010

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
MARVIN VERNIS SMITH,
Defendant and Appellant

No. G040107.

(Super. Ct. No. 07CF1791)

OPINION

Appeal from a judgment of the Superior Court of Orange County,
Dan McNerney, Judge. Affirmed.

Riordan & Horgan, Dennis P. Riordan and Donald M. Horgan for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Robin Derman, Deputy Attorneys General, for Plaintiff and Respondent.

The trial court sentenced defendant Marvin Vernis Smith to 25 years to life in prison after a jury convicted him of first degree murder in the death of his wife Minnie Smith (Smith). Defendant appealed asserting several evidentiary and instructional errors.

In a prior opinion we reversed the conviction, finding insufficient evidence to support the trial court's instruction of the jury on aider and abettor liability. The Attorney General petitioned for review and the California Supreme Court granted it, remanding the matter to this court with directions to vacate our prior decision and reconsider the cause in light of *People v. Guiton* (I993) 4 Ca1.4th 1116. *(People v. Smith,* review granted June 23, 20 I 0, S 181911.)

Having reconsidered the case as directed by the Supreme Court, we now conclude the instruction on aider and abettor liability did not constitute prejudicial error and defendant's remaining claims lack merit. Thus, we affirm the judgment.

FACTS

Shortly after 6:30p.m. on December 15, 2005, police officers went to the Smith's residence in response to defendant's 911 call reporting that he believed an intruder was in the home. After entering the house, the police found Smith on the floor of the upstairs master bedroom next to an unmade bed dead from blunt force injuries to her head. The victim was lying face down, wearing a nightshirt covering only the upper part of her body with her hands bound behind her back by a wire coat hanger tied around the wrists. One foot missing a sock had burn marks. Investigators found matches, charred material, and pieces of duct tape near the body. Subsequent investigation determined the fatal blows came from a log roller stored next to the downstairs frreplace.

The police also found a kitchen window open with its screen removed. Just inside the window, a vase lay on its side on the floor. Drawers were open in several rooms throughout the house. In the master bedroom closet, a portion of the carpeting had been pulled back disclosing a floor safe with the lid open and no valuables inside of it.

When questioned later that evening about valuables kept in the home, defendant specifically mentioned a diamond encrusted gold medallion, a diamond encrusted Cadillac emblem, and a diamond ring he kept in the master bedroom armoire. A week later, defendant participated in a videotaped walk through of the house with investigators. Before the walk-through, the police closed the floor safe's lid and replaced the carpet covering it. The aforementioned jewelry items plus a bottle of liquor were the only items defendant identified as missing.

During the week following Smith's murder, an undercover officer saw defendant at a construction site using a six-foot long 2-by-4 board in an apparent effort to pry something sticking out of a concrete slab. The officer testified defendant held the board with his right hand above the shoulder and the left hand several inches farther down and alternately pushed and pulled the board for two to three minutes. The police arrested defendant after discovering the missing jewelry, Smith's social security card, and her other valuables in the trunk of his car inside plastic bags wrapped with duct tape.

The prosecution theorized defendant killed his wife on the morning of December 15 and staged the home to appear as if it had been burglarized. In addition to the location and condition of Smith's body, an autopsy revealed she had no food in her stomach. A police officer who saw the body the evening of December 15 observed dried streaks of blood on the victim's face and dried blood on the carpet under her head Bennie Thomas, Smith's son, testified he tried to call his mother the morning of

December 15. Contrary to her usual habit, she did not answer the phone or promptly return his call.

The pathologist who examined Smith's body testified the absence of bruising on her wrists indicated the wire hanger used to bind the hands had been affixed at or about the time of her death and that she had not struggled with her attacker. An investigator who examined the body at the home early in the morning of December 16 opined Smith died sometime between 5:30a.m. and 5:30p.m. on December 15.

The duct tape found near Smith's body came from a roll found in the garage of the residence that was also used to wrap the bags containing the jewelry discovered in defendant's car. Forensic testing found defendant's DNA profile on samples taken from the log roller, one of the burned matchsticks, and the duct tape next to the victim's body, plus the duct tape used to wrap the jewelry found in his car.

The police discovered a neighbor's tool box adjacent to the wall separating the neighbor's yard from the Smiths' residence, but an officer noted there was no disturbance of any dust or debris that would suggest a person had stood on the tool box or climbed over the wall. Nor could the officer fmd any indication someone had traversed the yard from the block wall to the kitchen window. The police did not observe foot prints in the planter outside the kitchen window and the screen removed from it was resting where it would have been in the way if a burglar attempted to leave the residence by that route. There was no scuffmg on the window sill. The ceramic vase lying on the floor below the window was not damaged.

The drawers removed from furniture had been neatly stacked and the contents of some drawers did not appear to have been disturbed. Although the master bathroom was ransacked, the police found a

gun, an item considered to have "a high street value," in one of the drawers. Neither a second 6-foot tall safe located in the garage that contained both several guns and a 12-inch high stack of $2 bills, nor wrapped Christmas gifts kept in a downstairs bedroom had been disturbed.

Defendant made inconsistent statements. He told the police he entered the house through the front door and believed his wife was not home, in part, because the front sunshade screen, which she usually kept in the up position, was down. Thomas testified defendant's practice was to enter the house through the garage where the police found Smith's car. The police officers dispatched to the home in response to the 911 call testified the screen was up when they arrived. Defendant also claimed he could not find the switch to raise the sunshade screen. One officer participating in the crime scene investigation testified the sunshade screen switch glowed in the dark. When questioned by the police on the night of December 15, defendant said he and his wife never locked the floor safe in the master bedroom closet. During the subsequent walk-through defendant claimed his wife kept the floor safe locked and denied he knew the combination to it.

The prosecution also presented evidence defendant and his wife fought during their marriage and defendant had engaged in extramarital affairs with other women. Samuel Matthews, who once worked at a liquor store owned by defendant, testified defendant "would ... say he wish[ed] it was just him and his dog or just him by himself." On another occasion, defendant purportedly told Matthews "the only way to get out of the marriage [was] they had to die," because he was "not going to give Minnie half of what I got so another man can live off of it."

The defense claimed defendant was not present when the murder occurred and could not have committed it himself. It also disputed the

prosecution's claims concerning the time of death, the staging of the alleged burglary, and state of the couple's marriage. The defense presented detailed evidence concerning defendant's whereabouts on December 15. Two defense witnesses testified to seeing a white vehicle parked in the Smith's driveway on the afternoon of December 15. Ada Moses, defendant's ex-wife, testified she saw the jewelry found in his ear several months before the murder when she placed some gardening tools in the trunk in preparation for a visit to their daughter's grave. Furthermore, the defense questioned defendant's ability to strike the fatal blows, introducing evidence he had undergone rotator cuff surgery on his left shoulder in early November 2005. Finally, it suggested Matthews may have killed Smith. Matthews purportedly owed defendant a substantial amount of money. He knew defendant had safes in the house and was aware of some details about the crime.

DISCUSSION

I. The Aider and Abettor Liability Claims

a. Introduction

During opening statement, the prosecutor asserted defendant "murdered his wife ... and then he staged the crime scene to make it look like a burglary ... to avoid detection." But during a discussion on jury instructions after the close of evidence, the prosecutor asked the court to instruct the jury on aider and abettor liability. "The jury doesn't have to necessarily believe, and I think defense counsel will argue that the defendant did not or could not have committed the crime himself. But that doesn't mean that if he didn't commit the crime himself, that if they find that he aided and abetted in the crime that he's still not guilty of the crime. [¶] So if he didn't swing the murder weapon, it doesn't mean he's not guilty of the crime." Over defense counsel's objection, the trial court agreed to give CALCRIM Nos. 400

["Aiding and Abetting: General Principles"] and 40 I ["Aiding and Abetting: Intended Crimes"]. Defendant challenges use of the aiding and abetting theory on several grounds.

b. The Aiding and Abetting Liability Instructional Error

First, defendant claims the evidence failed to support an aider and abettor theory of liability. In our previous opinion, we agreed with this argument and reversed his conviction, finding this error prejudicial. *(People v. Perez* (2005) 35 Cal. 4th 1219, 1233; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The Supreme Court granted review and transferred the matter to us for reconsideration in light of its decision in *People v. Guiton, supra,* 4 Cal. 4th 1116. There a police officer conducting narcotics surveillance saw the defendant hand a confederate something and, after engaging in a transaction with a third person, the confederate handed something to the defendant. When police officers later stopped a vehicle occupied by the defendant and his confederate, they discovered a bag containing cocaine near the defendant's feet. The prosecution charged the defendant with violating a statute that made it a crime to either sell or transport cocaine and, at trial, the jury was instructed on both theories of guilt. The Court of Appeal reversed the defendant's conviction. While it agreed the evidence supported a finding the defendant transported cocaine, the court found the evidence failed to support a conclusion he sold cocaine and it could not determine on which theory the jury based its verdict.

The Supreme Court granted review and reversed the Court of Appeal. After discussing and harmonizing its prior decision in *People v. Green* (1980) 27 Cal. 3d 1, disapproved on another ground in *People v. Martinez* (1999) 20 Cal. 4th 225, 239, with *Griffin v. United States* (1991) 502 U.S. 46 [112 S.Ct. 466, 116 L.Ed.2d 371], the court stated the rule

as follows: "If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground. But if the inadequacy is legal, not merely factual, ... the ... rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." *(People v. Guiton, supra,* 4 Cal.4th at p. 1129, fn. omitted.)

As for "determining whether there was prejudice" when a trial court instructs on a factually unsupported theory of conviction, the court "adopt[ed] the following test. ... [T]he appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." *(People v. Guiton, supra,* 4 Cal.4th at p. 1130.) In applying this standard, the court explained "the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict. [Citation.] Furthermore, instruction on an unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt; if the jury based its verdict on the valid ground, or on both the valid and the invalid ground, there would be no prejudice,_[or there would be a valid basis for the verdict." *(Ibid.)*

Applying *Guiton's* principles here, we conclude the record does not affirmatively indicate the jury based its guilty verdict solely on the aider and abettor theory. The parties presented conflicting evidence on whether defendant was present when his wife was murdered and whether he had the physical ability to strike the fatal blows himself. Although requesting an instruction on aiding and abetting liability, the prosecutor disavowed reliance on it as a basis for conviction. He failed to assert it during closing argument and when mentioning it during

rebuttal declared, "Is it my theory? Heck, no, it's not my theory. That's not what I think happened." Defense counsel also discounted the existence of an aider and abettor, describing it as "a new theory in this case" about "a phantom second guy. And [defendant] is going to be with that phantom second guy. And that second guy is going to be doing the killing and the lifting and whatnot, even though the prosecution's DNA experts say there's no foreign DNA found in the house."

During their nearly five hours of deliberations, the jurors sent out a request for some trial materials, including the log roller and "medical records from [the] surgeon & physical therapist .... " Agreeing with the United States Supreme Court's observation that "jurors *are* well equipped to analyze the evidence [citation]" *(Griffin V. United States, supra,* 502 U.S. at p. 59), *Guiton* concluded, ""The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.' [Citation.] Thus, if there are two possible grounds for the jury's verdict, one unreasonable and the other reasonable, we will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable ground." *(People v. Guiton, supra,* 4 Cal.4th at p. 1127.) These requests indicate the jury focused on whether defendant had the physical strength to beat his wife to death. There is no suggestion it focused on only the aider and abettor theory in this case.

Finally, although the trial court read superfluous portions of CALCRIM Nos. 400 and 401 to the jury, as discussed at greater length below, the extraneous material likely had no effect on its deliberations. Under these circumstances, the trial court's error in giving aiding and abetting instructions did not constitute prejudicial error.

c. *Prosecutorial Misconduct*

Defendant also argues the prosecutor's delay in asserting the aiding and abetting theory until after the close of evidence and waiting until his rebuttal argument to argue it constituted prosecutorial misconduct.

Initially, we note defendant has waived these claims by failing to timely assert them. "'A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.' [Citation.]" *(People v. Lopez* (2008) 42 Ca1.4th 960, 966.) While defendant's trial counsel objected to instructing the jury on aiding and abetting liability, she did not assert the prosecutor committed misconduct by requesting the instructions or to the timing of his request for instruction on this theory of liability.

Nor does the record support a finding of prosecutorial misconduct. ""The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."" [Citation.]" [Citation.]" [Citation.]" *(People v. Stanley* (2006) 39 Cal.4th 913, 951.)

The prosecutor requested the aider and abettor instructions outside the jury's presence. Contrary to defendant's claim that he was "deprived of [the] ability to counter this alternative theory with evidence," the trial court agreed to instruct on it,

citing the "evidence that's been presented *.from both sides* regarding the issue of whether or not [defendant] had the ability ... to inflict the blow that resulted in ... Smith's death," plus other evidence indicating defendant "was involved and benefited from it, [and also] had a motive for it .... " (Italics added.)

Knowing the court was going to instruct on aider and abettor liability, defense counsel was afforded a sufficient opportunity to refute the aiding and abetting liability theory in her closing argument and did so. Asserting "[n]ow, that we've proven [defendant] couldn't have done it" and "proven there wasn't the time" for him to commit the murder, she referred to the "phantom second guy" as "a new theory in this case, [presented] for the first time ever ... today."

What's more, as discussed above, the prosecutor's reference to aiding and abetting liability during his rebuttal argument was abbreviated, merely acknowledging "[h]eck, no, it's not my theory," and "[t]hat's not what I think happened." In fact, the argument on this point was so meager that after he finished, defense counsel again unsuccessfully sought to eliminate the aiding and abetting instructions claiming the prosecutor "did not argue any alternative theory to the jury .... " "He essentially told the jurors it was the court's position that the aiding and abetting instruction[s] ha[ve] to be given .... [¶] Now, he ... failed to argue it, other than to say it's the People's position [defendant] did it .... " The prosecutorial misconduct claim lacks merit.

d. Due Process

Next, defendant claims the prosecution violated his right to due process by failing to provide adequate notice of the aider and abettor liability theory, resulting in a "'trial by ambush.'" We disagree.

"Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them. [Citations.]" *(People v. Seaton* (2001) 26 Cal.4th 598, 640.) However, "[w]e have long held that under this state's statutory scheme, an accusatory pleading charging a defendant with murder need not specify the theory of murder on which the prosecution intends to rely. [Citations.] Although we have recognized that there are situations in which the United States Constitution may require greater specificity [citations], generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing or at the indictment proceedings. [Citation.]" *(People v. Diaz* (1992) 3 Cal.4th 495, 557.)

The information charged defendant with murder in compliance with the governing statutes (Pen. Code,§§ 951,952 & 971), alleging "in violation of[s]ection 187[, subdivision] (a) of the Penal Code" he "unlawfully and with malice aforethought kill[ed]" Smith. Furthermore, even if this case required greater specificity concerning the basis of defendant's liability, the evidence presented at his preliminary examination provided it.

During that hearing, Chris McShane, an investigator in this case, testified the police received information from David Moraga, a jail inmate who shared a cell with defendant during the latter's pretrial detention. McShane testified Moraga claimed defendant "had told him that he [defendant] had to get rid of his wife because she was standing in the way of his future plans; that she was threatening to divorce him and he wasn't going to give up half of his property he worked so hard for his entire life. [Defendant] [s]aid on the day of the murder he had left the house earlier than he normally does, that [when] he left, he took the jewelry and the money out

of the safe with him. He staged it to look like a home invasion robbery. He left a window open. He exited the house without setting the alarm. He went through the front door of the house, and that he went to work that day."

On cross-examination, McShane provided the following additional testimony: "Q. Did Mr. Moraga ... tell you the manner in which the killing was carried out? [¶] A. He said that she was beat up real bad. [¶] Q. Did he give any further details? [¶] A. No. [¶] Q. Did he tell you who specifically did the killing? [¶] I notice you're pausing .... [¶] ... [¶] Q. And [Moraga] really didn't have any information about who specifically did the homicide, did he? [¶] A. [Defendant] never told him specifically who did it, no. [¶] Q. And [Moraga] didn't really have any information, for example, about the wrist[s] being bound with wire, correct? [¶] A. Correct. [¶] Q. Or any anal tears, correct? [¶] A. Correct. [¶] Q. Or that she was bludgeoned with a type of fireplace implement? [¶] A. Correct. [¶] Q. He didn't know any of the details of the homicide itself and how it was carried out, correct? [¶] A. Correct. [¶] Q. Did he tell you that the homicide was committed before [defendant] left the house or was he vague on that point? [¶] A. He was vague. [¶] Q. In fact, he wasn't able to tell you whether this supposedly occurred in the morning, in the afternoon, or the evening, correct? [¶] A. Correct."

The prosecutor did not call Moraga as a witness at trial. But the preliminary examination testimony about statements defendant purportedly made to Moraga reflect that, not only did he have a motive to kill his wife, participated in planning her murder and staging the house to make it appear the murder was the result of a botched burglary, but it also suggests defendant may not have personally committed the murder. Thus, even in the absence of an aider and abettor liability allegation in the information, the evidence presented at defendant's preliminary examination meaningfully apprised

him of the potential for an aiding and abetting theory.

Defendant relies on *Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234 to support this argument. That case is unpersuasive for two reasons. First, *Sheppard* is of doubtful precedential effect. It involved a murder conviction where the defendant claimed the prosecution failed to give him adequate notice it intended to proceed on a felony-murder theory. The Supreme Court has "long held that a pleading charging murder adequately notifies a defendant of the possibility of conviction of first degree murder on a felony-murder theory. [Citations.]" *(People v. Gallego* (1990) 52 Cal.3d 115, 188-189.)

Second, *Sheppard* is distinguishable from this case. There the prosecution charged the petitioner with first degree murder on a premeditated and deliberate killing theory. But after the parties rested and the trial court settled the instructions, the prosecutor, over a defense objection, successfully urged the court to instruct on and allow him to argue felony murder based on a killing during the course of a robbery. On a postconviction habeas corpus petition, the Ninth Circuit Court of Appeals reversed, accepting the California Attorney General's concession the "'petitioner *was* denied adequate notice and opportunity to prepare to defend'" "because a *pattern of government conduct affirmatively misled [him]*." *(Sheppard v. Rees, supra,* 909 F.2d at p. 1236.)

Here, the information and preliminary examination testimony adequately notified defendant he could be prosecuted for murder as an aider and abettor. The prosecution's request for aiding and abetting liability instructions occurred during the parties' general discussion of the jury instructions and not just prior to closing argument. The prosecutor did not mention the aider and abettor theory during closing argument and, as explained

above, mentioned it only briefly during rebuttal as a fall back position. As in *People v. Gallego, supra,* 52 Cal.3d 115, the prosecution "avoid[ed] the 'ambush' situation faced by the defendant in *Sheppard,"* and did not deny defendant "the notice guaranteed him under the Constitution." *(Id.* at p. 189.)

e. Instructional Error

Defendant also claims the trial court committed instructional error concerning the aiding and abetting theory by including inapplicable portions of CALC RIM Nos. 400 and 401. His contentions lack merit.

In giving CALCRIM No. 400, the court read an optional portion contained in brackets stating, "Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime." Defendant notes this part of the instruction is relevant only when the natural and probable consequences doctrine applies and since "such instruction was certainly not justified by the evidence," the court read it "no doubt through oversight." Nonetheless he argues the error prejudiced him, claiming this part of the instruction also told the jury he "could be found guilty of a charged crime by virtue of aiding some other crime, but was not informed of the ... requirements" set forth in *People v. Prettyman* (1996) 14 Cal. 4th 248, "which must be fulfilled before applying that vicarious liability principle .... "

As for CALC RIM No. 401, defining what must be proved to establish aiding and abetting an intended crime, defendant challenges the court's addition of two optional portions of the standard instruction. The first disputed aspect declares: "If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the

defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor." The second challenged portion ofCALCRIM No. 401 concerned when and how one withdraws from aiding and abetting a crime. Again defendant notes "there was not a scintilla of evidence to support" a finding he "aided the perpetrator in the planning of the crime, [but] then attempted to withdraw from the commission of the crime .... " He claims prejudice resulted because it "introduced a particularly powerful concept into the jury's deliberations - that of the defendant's failure to prevent the crime as a basis for conviction - and the impact of that error must be considered in the context of the other aiding and abetting instructions."

Defendant acknowledges the challenged portions ofCALCRIM Nos. 400 and 401 were irrelevant to this case. "'[T]he crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.' [Citations.]" *(People v. Smith* (2007) 40 Cal.4th 483, 517-518.) The court gave the standard instruction informing the jury "[s]orne of these instructions may not apply at all," and "[d]on 't assume just because I give a particular instruction that I'm suggesting anything about the facts. After you decide what the facts are, follow the instructions that apply to those facts as you find them."

Furthermore, the use of abstract instructions is rare! y a basis for reversal. "Giving an instruction that is correct as to the law but irrelevant or inapplicable is error. [Citation.] Nonetheless, giving an irrelevant or inapplicable instruction is generally "'only a technical error which does not constitute ground for reversal.'" [Citation.]" *(People v. Cross* (2008) 45 Cal. 4th 58, 67.) In *People v. Prettyman. supra,* 14 Cal.4th 248, the Supreme Court applied this rule, noting "(t]he superior court's error in giving an 'abstract' instruction on the natural-and-probable-

consequence rule" was "harmless" because "[t]he instruction on the rule must have been understood, and dismissed, by the jury as mere surplusage. [Citation.] It carmot be held to have resulted in a 'miscarriage of justice.' [Citation.]" (*Id.* at p. 280.)

Defendant's contentions as to how the jury could have construed the inapplicable portions of CALC RIM Nos. 400 and 401 are not persuasive. "In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record. [Citations.]" *(People v. Dieguez* (2001) 89 Cal.App.4th 266, 276; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 ["'the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction'"].) "When a claim is made that instructions are deficient, we must determine whether their meaning was objectionable as communicated to the jury. . . . The meaning of instructions is no longer determined under a strict test of whether a 'reasonable juror' *could* have understood the charge as the defendant asserts, but rather under the more tolerant test of whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel. [Citations.]" *(People v. Dieguez, supra,* 89 Cal.App.4th at p. 276.)

Contrary to defendant's argument, it is unlikely a reasonable jury would view the abstract instructions as a third basis for finding him guilty of his wife's murder. This "third way" was not argued to the jury. The prosecution sought to convict defendant of his wife's murder as the actual killer, suggesting only that he could be convicted for aiding and abetting another in committing the murder as a contingent alternative. No evidence supported theories that he could be convicted of murder because he either assisted in commission of

some other unidentified crime or failed to try to stop the murder from occurring. Nor was there any claim or evidence suggesting defendant attempted to withdraw from this criminal enterprise before the murder occurred. The trial court's reading of irrelevant portions of the aiding and abetting instructions was harmless.

2. The 1991 Altercation

a. Introduction

In a pretrial hearing, the court granted a prosecution request to introduce the testimony of Annis Cravin, a former neighbor of the Smiths, concerning a physical altercation between defendant and his wife, finding the testimony relevant to the issue of identity.

At trial, Cravin testified that in 1991 the Smiths lived next door to her. Early one evening, Smith arrived home and rushed into the house, slamming the door behind her. Shortly thereafter, defendant arrived and entered the house. Cravin heard yelling and loud talking coming from their residence. She then heard Smith scream, some rumbling, and then what sounded like a gunshot. Cravin called 911. The police arrived and took defendant away in handcuffs. Several minutes later, Smith emerged from the home with paramedics bleeding profusely from her right temple. Cravin saw Smith the next day. She had several stitches in her head. Defendant returned to the home the next day as well. The court instructed the jury "you may, but are not required to, consider th[e] evidence for the limited purpose of deciding whether or not the defendant was the one who committed the crime charged in this case."

b. Admissibility of the 1991 Altercation

Defendant challenges the admission ofCravin's testimony, claiming it failed to satisfy the

requirement of substantial similarity required for other crimes evidence admitted to establish identity under Evidence Code section 1101, subdivision (b). Also, because the incident occurred more than 10 years before Smith's murder, he argues the evidence was inadmissible as propensity evidence under Evidence Code section 1109, subdivision (e). Finally, he contends the trial court erred by not excluding Cravin's testimony under Evidence Code section 352.

"Generally, the prosecution may not use a defendant's prior criminal act as evidence of a disposition to commit a charged criminal act. (Evid. Code,§ 1101, subd. (a).) But evidence is admissible 'when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge ...) other than his or her disposition to commit such an act.' (Evid. Code, § 1101, subd. (b).)" *(People v. Davis* (2009) 46 Cal. 4th 539, 602.) "'We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.' [Citation.]" *(Ibid.)*

The trial court admitted evidence of the 1991 altercation on the issue of identity. Prior misconduct evidence is generally admissible to prove identity only if "the uncharged misconduct and the charged offense ... share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" *(People v. Ewoldt* (1994) 7 Cal.4th 380, 403.)

However, an exception to this rule applies to a defendant's prior assault on the victim of the charged offense. "Without resort to a 'distinctive *modus operandi'* [citation], 'signature' [citation], 'calling card' [citation] analysis of *otherfactors,* ' ... the common mark of the identical perpetrator and identical victim in both the charged and uncharged offenses is so distinctive that it adds persuasive

support to the inference that defendant and not some other person was the perpetrator ... []' [citations] and renders the prior evidence admissible on the issue of identity." *(People v. Zack* (1986) 184 Cal.App.3d 409, 414; see also *People v. Beamon* (1973) 8 Ca1.3d 625, 633 ["the common mark of the identical perpetrator and identical victim in both the charged and uncharged offenses is so distinctive that it adds persuasive support to the inference that defendant and not some other person was the perpetrator of both offenses"].) Thus, "[w]here a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults upon the same victim, when offered on disputed issues, e.g., identity, intent, motive, etcetera, are admissible based solely upon the consideration of identical perpetrator and victim without resort to a 'distinctive modus operandi' analysis of other factors." *(People v. Zack, supra,* 184 Cal.App.3d at p. 415.)

Although *Zack* was decided before the Supreme Court decided *People v. Ewoldt, supra,* 7 Cal.4th 380, *People v. Linkenauger* (1995) 32 Cal.App.4th 1603 held *Zack* and the case law on which it relied is still valid. "The California Supreme Court's ' ... statements of law remain binding on the trial and appellate courts of this state [citations] and must be applied wherever the facts of a case are not fairly distinguishable from the facts of the case in which [it has] declared the applicable principle of law.' [Citation.] The general rules promulgated in *Ewoldt* are not here controlling because the instant factual context is fairly distinguishable." *(* at p. 1613.) Thus, the rule declared in *Zack* "survive[d] *Ewoldt." (Ibid.)*

Defendant alternatively argues the holdings in *Zack* and *Linkenauger* were legislatively overruled by the 1996 enactment of Evidence Code section 1109, which places a 10-year limit on the admissibility of prior domestic violence evidence. This claim lacks merit. Subject to certain limitations, section 1109

allows for admission of "evidence of the defendant's commission of other domestic violence" in "a criminal action in which the defendant is accused of an offense involving domestic violence .... " (Evid. Code,§ 1109, subd. (a).) Thus, it allows the admission of prior acts of domestic violence only to establish the defendant's propensity to commit such acts. *(People v. Hoover* (2000) 77 Cal.App.4th 1020, 1024, 1027-1028.) The exception recognized in subdivision (b) of section 1101 applies when the prior act evidence is "relevant to prove some fact ... other than his or her disposition to commit such an act." (Evid. Code,§ 1101, subd. (b).) *Zack* and *Linkenauger* involve applications of the latter rule. In this context, "[n]o specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible. [Citations.]" *(People v. Branch* (2001) 91 Cal.App.4th 274, 284.)

Defendant also argues the trial court erred by not excluding Cravin's testimony under Evidence Code section 352. We review a ruling under this statute for abuse of discretion. *(People v. Mungia* (2008) 44 Cal. 4th 1101, 1130.) The mere fact the trial judge did not state on the record his consideration of Evidence Code section 352 did not constitute error. "Although the record must 'affirmatively show that the trial court weighed prejudice against probative value' [citations], the necessary showing can be inferred from the record despite the absence of an express statement by the trial court. [Citation.] The record indicates the court gave careful consideration to defendant's claims at hearings held outside the presence of the jury. The court considered an offer of proof as to the anticipated testimony ... and excluded certain damaging elements of the witness's statements from evidence. The court referred to the high probative value of the evidence, and we properly may infer that the court determined that the probative value outweighed any undue prejudice." *(People v. Prince* (2007) 40 Cal.4th 1179, 1237.)

Here, the prosecution's pretrial motion sought a determination on the admissibility of several prior acts of violence by defendant. The parties' points and authorities on these evidentiary requests cited to Evidence Code section 352. Both the court and counsel referred to the factors of the probative value of each incident, the remoteness of the events, and the potential for prejudice from the admission of each incident. After extensive briefing and argument on the issue, the court limited the prosecution to introducing Cravin's testimony. We conclude the trial court balanced the statutory factors and properly exercised its discretion in finding evidence of the 1991 altercation admissible. No error occurred in admitting evidence concerning the 1991 altercation.

c. Prosecutorial Misconduct

Defendant also contends the prosecutor committed misconduct by misstating the law concerning use of the 1991 altercation evidence. During rebuttal, the prosecutor asserted "the 1991 bludgeoning where the defendant beat ... Smith" was "one of the biggest indicators of marital discord" "[b]ecause the law tells you it's a great indicator. ... The law tells you that's such powerful evidence you can use it if it's proven by a preponderance that that beating took place . . . . And it's undisputed at this point. That is such powerful evidence you can use it to determine the identity of the murderer." Defendant claims this argument misstated the law by claiming, since the jury had to first determine whether it was more likely than not that defendant struck Smith in 1991 before it could consider the probative value of the incident, "the prosecutor ... turned the truth on its head by claiming that ... meant ... the law ascribed an elevated worth to uncharged prior offense evidence."

As before, we note defendant failed to object to this statement or request the jury be admonished. Thus, the issue has been waived. *(People v. Lopez, supra,* 42 Cal. 4th at p. 966.)

Even on the merits, defendant's argument fails. "Regarding the scope of permissible prosecutorial argument, ""a prosecutor is given wide latitude during argument."'" *(People v. Stanley, supra,* 39 Ca1.4th at p. 951.) "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complainedof remarks in an objectionable fashion. [Citation.]" *(People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Applying these standards, we find no misconduct. Defendant's claim, the prosecutor argued "the law ascribed an elevated worth to uncharged prior offense evidence," takes the prosecutor's arguments out of context. A more reasonable interpretation of the prosecutor's statements is that the 1991 incident was probative of both the marital discord between defendant and Smith and as to the identity of Smith's killer. This misconduct claim lacks merit.

3. The Limitation on Defense Expert Testimony

The final claim is that the trial court erred by precluding the defense from questioning its expert witness on crime scene staging about defendant's statements as to when he placed the jewelry in his car trunk. Defendant argues the prosecution opened the door to admission of the statements and then committed misconduct by referring to the lack of this evidence during closing argument.

a. Introduction

As mentioned, just after the murder, defendant made statements to the police identifying jewelry he noticed missing from the residence. A week later, the police found the missing jewelry in the trunk of defendant's car. When confronted with this discovery, defendant purportedly told the police

he had placed the jewelry in his trunk months earlier.

Before trial, the defense sought to have Moses testify defendant had a habit of taking back gifts if he felt unappreciated, and that he told her several months before Smith's murder he had taken his wife's jewelry and placed it in the trunk of his car. In addition, at this time the prosecution was still considering calling Moraga to testify as to defendant's incriminating statements about the murder while in pretrial detention. In part, Moraga also purportedly told the police defendant said he placed the jewelry in his car before the murder.

Citing defendant's purported statements to Moraga and the police, the defense argued Moses's testimony was admissible as a prior consistent statement being introduced to rebut a claim of recent fabrication. (Evid. Code,§§ 1236 & 791, subd. (b).) The court ruled Moses's testimony concerning what defendant purportedly told her months before the murder would only be admissible if either (1) the police officer who confronted defendant with the discovery of the jewelry in his trunk testified to what defendant said at that time, or (2) Moraga took the stand and testified defendant claimed to have taken the jewelry before the murder. Moraga was not called to testify at trial, and the prosecutor did not ask the arresting officer if defendant said anything when the police discovered the jewelry in his car's trunk.

At trial, each party called an expert witness on crime scene staging. These witnesses gave contradictory opinions on whether the apparent burglary at the Smith residence had been staged. The defense expert, Brent Turvey, testified the physical evidence did not support a conclusion the burglary had been staged. Asked on direct examination about the jewelry found in the car's trunk, Turvey testified that to tie this evidence to the murder "you need physical evidence to associate it with the crime," and "[y]ou have to be able to establish when that jewelry

was put in that location."

On cross-examination, when the prosecutor asked Turvey "Did you review the statements of ... witnesses in the case," he responded, "I did not. In fact, I wanted to remain as impartial in favor of the physical evidence as I could, so I refrained from reviewing as much information that came from witnesses as possible." The prosecutor also asked Turvey if he "compare[d] ... statements made about the jewelry" with the physical evidence, Turvey said, "No." Asked, "Wouldn't you want to consider the statements made by people regarding the one thing that was identified as positively ... missing from the crime scene and test the falsity of that," Turvey responded "we don't have ... in this case ... physical evidence that associates that actual
jewelry ... with the crime. So until we have that, until we associate it with the actual crime, then any statements made by any witnesses are sort of irrelevant."

After a noon recess, the prosecutor continued cross-examining Turvey. At one point, he asked: "If, hypothetically, a homeowner claimed that he was absolutely certain that some very specific jewelry was in a certain location before the burglary, and pointed the location out to police and described several items of jewelry ... , and then he further ... described [the] kinds of ... containers the jewelry was in, ... and then that jewelry was subsequently ... found in the trunk of his own car ... and wrapped in duct tape that was consistent with duct tape found at the crime scene, does that affect your opinion one way or the other as to whether or not the crime scene is staged?" Turvey responded, "No."

Although denying defense counsel's request to immediately approach the bench, the court allowed her to do so before beginning redirect examination. Defense counsel explained that, over the lunch recess, she "familiarized Mr. Turvey with ... all of the statements" from defendant. Claiming the

prosecutor's question "only offered the statements from the walk-through and from the night that Mrs. Smith was found murdered" while "object[ing] to my introducing the statement that [defendant] made when he was arrested," defense counsel claimed the prosecutor "has opened th[e] door" and she "should now be permitted to inquire, was [Turvey] aware of a[] statement by [defendant] at the time of his arrest .... " The trial court denied the request.

b. Analysis

Citing *People* v. *Bell* (2007) 40 Cal. 4th 582, and repeating the claim the prosecutor "clearly opened the door to a redirect examination on whether [the defense expert's] opinion was influenced by ... [defendant's] statements," defendant now contends the trial court erred in limiting redirect examination of the defense staging expert concerning his statements to Moses and the police about when he placed the jewelry in the trunk of his car. This contention lacks merit.

"Expert testimony may ... be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.] ... [¶] So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter ... upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.]" *(People* v. *Gardeley* (1996) 14 Cal.4th 605, 618.)

In *People v. Bell, supra,* 40 Cal. 4th 582, the prosecution charged the defendant with capital murder based on a special circumstance allegation

that he killed the victim during the course of a robbery. To defeat the special circumstance allegation, the defendant presented evidence the killing occurred during a drug-induced psychotic break with reality. One expert called by the defense was a psychologist who interviewed defendant about his childhood, drug use, and thoughts and feelings when killing the victim. The trial court sustained a prosecution objection to allowing the psychologist to repeat defendant's statements about the murder. However, during cross-examination, the prosecutor asked the psychologist to "clarity" how the defendant, who "'was bent on stealing so he could buy more cocaine, all of a sudden ... reverted back to when he was a child and remembered all the times he was in trouble in school.'" *(Id.* at p. 610.) The psychologist's answer referred to the defendant's statements. The prosecutor then objected to his own question and moved to strike the psychologist's answer. Defense counsel objected to the latter request. During a chambers conference, the trial judge agreed "the prosecutor had opened a door to [the psychologist's] relation of [the] defendant's statements, but observed that 'this is a complete mess because of all the objections. And I'm going to just strike it all.'" *(Id.* at p. 611.)

On appeal, the defendant challenged both the trial court's ruling limiting the scope of the psychologist's testimony on direct examination and striking the prosecutor's question and the psychologist's response during cross-examination. On the first issue, the Supreme Court agreed with the trial court's ruling. "While the potential for prejudice may not have been as great as suggested by the trial court, we agree with the Attorney General that the court's weighing of prejudice and probativeness was not arbitrary or capricious. [Citation.] Though the excluded statements were not particularly inflammatory, for the jury to separate their proper and improper uses would have been difficult." *(People v. Bell, supra,* 40 Cal.4th at p. 609.)

Although ultimately finding it harmless, the Supreme Court concluded the trial court did err by striking the psychologist's reference to the defendant's statements on cross-examination. "Having asked the proverbial 'one question too many' and received an answer he did not like, the prosecutor was not entitled to turn back the clock. Although the record of objections and motions may have been in a 'confused state,' as the trial court said, the prosecutor's question and [the psychologist's] answer were clear enough. The *evidence* was not in a particularly confused state, and there was no apparent reason to strike it." *(People v. Bell, supra,* 40 Cal.4th at p. 612.)

Under the foregoing authorities, the trial court properly barred the defense from using the crime scene staging expert as a platform to introduce defendant's otherwise inadmissible statements. The law generally allow an expert to describe the material upon which he or she relied to form an opinion, even if that material is otherwise inadmissible evidence. But, unless the expert claims he relied on certain material to form an opinion, a party is not entitled to employ the limited exception created by Evidence Code section 802 as a hook to introduce otherwise inadmissible evidence simply by disclosing the material to the expert.

For this reason, defendant's reliance on the decision in *People v. Bell, supra,* 40 Ca1.4th 582 is unavailing. There the psychologist relied on the defendant's statements about his thoughts and feelings when the murder occurred. Here, Turvey testified he based his opinion on the physical evidence and the testimony of other experts who analyzed the physical evidence. Turvey made it clear that, in forming his opinion, he "refrained from reviewing [witness statements] as much ... as possible."

Nor can defendant argue the prosecutor "opened the door" to admit defendant's prior

statements about when he placed the jewelry in the car. During crossexamination, the following colloquy occurred: "Q. "So as a forensic scientist, you're going to disregard anything that anybody says? [¶] A. No. I treat anything that anyone says as a theory. A victim and suspect statements are theories against which must be compared to [the] physical evidence . . . . [¶] Q. Did you compare, just for theoretical purposes, statements made about the jewelry in this case? [¶] A. No. [¶] Q. Not even for theoretical purposes? [¶] A. No." Although defense counsel complained that the prosecutor's hypothetical question failed to include all of the relevant statements, she did not object to the question. *(People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193 ["A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court"].) The trial court properly barred defense counsel from questioning Turvey about defendant's otherwise inadmissible statements concerning when he placed the jewelry in the vehicle.

c. Prosecutorial Misconduct

During rebuttal, the prosecutor argued, "If you find that the defendant lied about facts surrounding the crime, you get to use that as you figure out is he guilty. Guilty people lie .... [I]f this defendant lied about something- gee, I don't know –like the jewelry that we have heard no explanation for. None. [¶] ... [¶] Use the jury instructions for consciousness of guilt. Look at the jewelry, his lies to the police, his hiding and suppressing evidence. It's over. It's over. It's that simple." Defendant now claims since his statements to Moses and the police concerning when he placed the jewelry in the trunk had been excluded at the prosecution's request, the prosecutor's "absence of [an] explanation" argument amounted to misconduct.

As before, no objection was interposed at trial nor was there a request for admonishment. Thus, the prosecutorial misconduct claim has been waived.

Furthermore, based on the foregoing discussion, it is also without merit. While a prosecutor commits misconduct by arguing the defense failed to present evidence where its absence is the result of an erroneous evidentiary ruling obtained at the prosecution's urging *(People v. Varona* (1983) 143 Cal.App.3d 566, 570), "[b]ecause the prosecutor's argument constituted fair comment on the evidence, following evidentiary rulings we have upheld, there was no misconduct and, contrary to defendant's claim, no miscarriage of justice" *(People v. Lawley* (2002) 27 Cal.4th 102, 156).

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.